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AMENDED WRIT PETITION

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

W.P. No.4421/2004

PETITIONER

Ricken Impex Private Limiated, A company Incorporated under Indian Companies Act, 1956 is represented through : Director Ashok Singhi, it has its Registered Office 209, Jai Complex 46 BB Ganguli Street Kolkata and for the purpose of this petition, the Director Ashok Singhi has been authorised by the Company.

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VERSUS

RESPONDENTS

1. State of Chhattisgarh, Through the Secretary, Department of Transport, Mantralya, D.K.S. Bhawan, Raipur (C.G.)

2. Transport Commissioner, Government of Chhattisgarh, 647 Ravi Nagar Raja Talab, Raipur (C.G.)

WRIT PETITION UNDER ARTICLE 226/227 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT IN NATURE OF CERTIORARI, MANDAMUS, PROHIBITION AND OTHER SUITABLE WRIT OR WRITS, DIRECTION OR DIRECTIONS, ORDER OR ORDERS :

103

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.4421 of 2004

Rickon Impex Pvt. Ltd.

- Versus -

State of Chhattisgarh & another

POST FOR ORDER ON 7TH MARCH, 2005

Sd/-
L.C.BHADOO
Judge

(104)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

Writ Petition No.4421 of 2004

Rickon Impex Pvt. Ltd.

- Versus -

State of Chhattisgarh & another

Present: -
Mr. Kishore Bhaduri, Advocate: For the petitioner

Mr. Prashant Mishra, Additional Advocate General with Mr. Sumesh Bajaj, Dy. Govt. Advocate: For the respondents

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Before Hon'ble Mr. L.C. Bhadoo, J.

O R D E R

(Passed on 7th March, 2005)

1. By this writ petition under Articles 226 & 227 of the Constitution of India the petitioner has questioned the legality and propriety of clause 1.3(d) regarding 'eligibility criteria' & clause 4(16) regarding 'no claim certificate' incorporated in the terms & conditions of notice inviting tender issued by respondent No.2, on the ground that the eligibility criteria is arbitrary, so as to oust the fair competition and to monopolize the functioning of a particular company or individual by adding this eligibility criteria.

2. Brief facts leading to filing of this petition are that respondent No.2 herein vide its NIT No.PVC/01/2004-05 invited offers from competent bidders for preparation & supply of PVC based computerized driving license at its Road Transport Office(s), (RTO) situated at eight districts headquarters mentioned in the notice inviting tender. Date for purchase of tender document was fixed from 12.10.2004 to 25.10.2004 on payment of non-refundable tender fee Rs.500/-, last date fixed for submission of tender document for Raipur & Jagdalpur was 16.11.2004, for Bilaspur,

Ambikapur & Rajnandgaon 17.11.2004 and for Durg, Korba & Raigarh 18.11.2004 and same dates were fixed for opening of technical bid. It was further made clear that bid will remain valid for 60 days from the schedule date of submission of bid. Apart from other terms & conditions in the eligibility criteria, a condition i.e. Clause No.1.3 (d) that '*the bidder concern must have its registered and head office in the State of Chhattisgarh*' was fixed. In clause 4.1 it was also fixed that "*the contract will be for a period of one year or till the introduction of Smart card, whichever is earlier*'. Clause 4(16) of the said terms and conditions envisages that "*the successful bidder shall not be entitled to make any claim, whatsoever, against the Transport Commissioner / The State Govt./ Transport Department, under or by virtue of or arising out of, this contract, nor shall it be entertained. The successful bidder shall sign a "No Claim" certificate in favour of the Transport Commissioner / The Transport Department in such form(s) as may be required.*"

3. The petitioner's case is that the petitioner is a registered and incorporated company under the Companies Act, 1956, having its head office at 209 Jai Complex, 46BB, Ganguli Street, Kolkata. The petitioner company is engaged in the business of manufacturing import-export trade of plastic, leather, electronic components and all other ancillary items including printing and textiles, plastics packing material and ancillary products. The petitioner company is presently engaged in the work of preparing and printing voters' identity card in the State of Bihar and is having turnover of more than Rs.27 Lac per year. Further case of the petitioner is that Clause No. 1.3(d) in eligibility criteria that a bidder concern must have its registered and head office in the State of Chhattisgarh is arbitrary, and the same has been incorporated to create monopoly in favour of a particular company or individual and other conditions i.e. Clauses 4.1 & 4.16 regarding contract period and no claim

are also arbitrary. Therefore, on these grounds the petitioner has challenged the notice inviting tender.

4. Return has been filed on behalf of respondents in which the allegations levelled by the petitioner Company have been denied and it has been mentioned that pattern of working of contractors to prepare the said PVC based computerized driving license cards is that they are allotted a space in the R.T.O. office where they install the computer set, scanner & printer and do the computerized printing work on the PVC cards brought by them. Thus, the contention of the petitioner that eligibility criteria as envisaged in clause 1.3(d) has been so envisaged only with the sole criteria to benefit the small-scale unit engaged in lamination work is absolutely false. The condition is very clear and has been imposed with only motto that the State Government can have direct check upon the intended contractor and can monitor all his activities including his efficiency, quality, quantity and disposal of the work assigned to him. This condition has been imposed because it has been a bitter experience of the Department that on earlier occasions also whenever the contractors were engaged from outside the State, though in other contracts, they were unable to prosecute their duties in a satisfactory manner. This condition further had been envisaged with the motto to encourage the entrepreneurs of the State. It was also the motive for engrafting this condition that the taxes payable by the contractors should come to the State Ex-chequer and also that the investments in the State be promoted. The said work did not require any special technology and can be very well achieved from the agencies operating in the State of Chhattisgarh. It has further been mentioned that the allegation of the petitioner that it amounts to create monopoly in favour of any particular company or individual is based on wrong premises, as the respondents have received 46 bids/tender documents duly filled in respect of various RTO from, as many as, 10 bidders and on scrutiny of said tenders documents

the respondents have found that as many as 8 bidders have fulfilled the said eligibility criteria and duly crossed the barrier of clause 1.3(d), therefore the allegations of the petitioner that monopoly has been created is baseless and without any foundation. Similarly, the contract period has been incorporated with an idea that as per the scheme of Government of India 'Smart card' has to be issued and in this connection a meeting on 26.10.2004 of the Secretaries of various States was convened, in that meeting the Smart card issue was discussed and it was decided to implement the same in near future. In the light of this averment, the said condition has been engrafted in the tender document so that as and when the Central Government makes the use of said Smart card mandatory, the State Government may also be able to issue Smart cards. It has been further mentioned in the return that the petitioner has no locus standi to file the present petition, as the petitioner has even not purchased the tender document and it is hopelessly hit by the principles of delay & latches, as the NIT was published on 9.10.2004 whereas this petition was filed on 20.11.2004. Therefore, the petition be dismissed.

5. I have heard learned counsel for the parties.

6. Learned counsel for the petitioner argued only on one point regarding the eligibility criteria incorporated in Clause 1.3(d) of the tender document, he did not argue on other grounds raised in the writ petition, therefore, ground No.1 is being adjudicated upon in this order. Learned counsel for the petitioner submitted that the condition envisaged in Clause 1.3(d) i.e. *the bidder concern must have its registered and head office in the State of Chhattisgarh* is arbitrary, it creates monopoly in favour of particular company or individual, it debars the bona fide eligible tenderers from filing their bid documents and in order to make bid fair and more

competitive said condition ought not to have been imposed. Moreover, same is not based on any sound objective to be achieved.

7. On the other hand, learned Additional Advocate General for the State Mr. Prashant Mishra argued that it is within the domain of the State to fix the terms & conditions of notice inviting tender & eligibility criteria and the petitioner has no right to question the same. He further argued that the said condition has been incorporated in the eligibility criteria in order to have full control over the successful bidder so as to get the work done from him within the time schedule because as per past experience, if any outsider, who is not registered with the State, is allowed to participate in the tender process and in case if tenderer is not able to complete the contract and left the same in the mid-way then the State will have no control over such contractor. Moreover, the State being a backward State, it may cause loss to State revenue, if outside bidders are allowed to participate. He further submitted that looking to the nature of contract it is not a contract of any high value or required any expertise and therefore, to promote the local entrepreneurs this condition has been imposed. Accordingly, in order to achieve the above objective this condition has been incorporated in the notice inviting tender.

8. In this connection law on the point, as has been held by the Hon'ble Apex Court in the matter of **Tata Cellular V. Union of India** reported in **1994 (6) SC 651** that "*the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. There can be no question of infringement of Article 14 if the government tries to get the best person or the best*

quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. The duty of the court is to confine itself to the question of legality. Its concern should be; (1) whether a decision-making authority exceeded its power? (2) Committed an error of law; (3) committed a breach of the rules of natural justice; (4) reached a decision which no reasonable Tribunal would have reached; or (5) abused its powers. It is only concerned with the manner in which those decisions have been taken. The grounds upon which administrative action is subject to control by judicial review can be classified on the ground of illegality, irrationality and procedural impropriety. It is further laid down that term of invitation to tender cannot be open to judicial scrutiny because the invitations to tender is in the realm of contract. Normally speaking the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure". In the matter of **AIR India Limited v. Cochin International Airport Limited** reported in **(2000) 2 SCC 617**, the Hon'ble Apex Court has held that:

> *"The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender*

conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

9. In the matter of **Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhaasnagar Municipal Corporation and other** reported in **(2000) 5 SCC 287**, it was held by the Hon'ble Apex Court that '*the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under considerations were better than the one prescribed in earlier tender invitations. But, in case of the deletion of eligibility conditions after expiry of the time-limit for submission of tenders, but before opening the tender, the Court held that award of contract to a tenderer who at the time of submission of tender did not satisfy the said condition rightly set aside by the High Court as arbitrary. The Apex Court further held that the Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate. The Government can reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons as fairness and equal treatment should be given to all the tenderers and all participants in the tender process should be treated alike.*

10. After considering all the judgments, again in the matter of **Directorate of Education and others V. Educomp Datamatics Ltd. and others** reported in **2004 AIR SCW 1505** the Hon'ble Apex Court held that:-

> *"The terms of invitation to tender are not open to judicial scrutiny the same being in the realm of contract. The Govt. must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Govt. because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."*

11. In the light of the above principle laid down by the Hon'ble Apex Court in the above judgments, it is clear that while exercising the power of judicial review the court is only concerned with the manner in which the decision has been taken to award the contract. The Court does not have the expertise to correct the administrative decision. The terms of the invitation to tender cannot be open to the judicial scrutiny because the invitation to tender is in the realm of contract. The Govt. must have freedom of contract in arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision, it can fix own terms of invitation to tender that is not open to judicial scrutiny, the authority calling for tender is the best judge to prescribe the terms and conditions of the tender subject to that the said decision is not arbitrary, malafide, illegal and irrational or actuated by bias.

12. Now, we have to see whether the respondents by fixing the impugned eligibility criterion have acted in an arbitrary manner or the said action of the respondents amounts to creating monopoly in favour of any particular company or individual.

13. In order to assail the said condition only argument advanced by learned counsel for the petitioner is that the said eligibility criteria amounts to debarring those eligible persons who wants to participate in the tender

process, offer their competitive rates and the same will be in the public interest also. As has been replied by the State that the objective behind imposing the said condition is that the State must have a direct check upon the intending contractor and monitor his all activities including his efficiency, quality, and execution of work assigned to him and being a backward State to encourage the entrepreneurs of the State and also to ensure the State revenue. It has further been submitted that the point raised by the petitioner that this condition has been imposed in order to monopolize the contract in favour of a particular company or individual person is wrong, as 10 bidders have already filled 46 bids and out of 10, 08 bidders have satisfied the eligibility criteria. Therefore, the eligibility condition has reasonable nexus with the objective to be achieved.

14. In view of the above fact that 8 bidders have already successfully filled their bids and they are eligible to participate in the tender process, therefore, it cannot be said that eligibility criteria amounts to creating monopoly in favour of any particular company or person. Further, in view of the reply filed by the State mentioned above, eligibility criteria cannot be termed to be arbitrary in any manner because the said eligibility criteria has been fixed with an objective that if the intending tenderer is registered and having its head office in the State of Chhattisgarh then the State can exercise its powers and get the work done from him within the stipulated time.

15. In the result, I am of the opinion that the petitioner has not been able to successfully assail the eligibility criteria on the ground of arbitrariness, the petition is without any merit, same is liable to be dismissed and accordingly, it is dismissed.

Sd/-
L.C.BHADOO
Judge